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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-1416

PASQUALE TEMPORALE, Petitioner,

VS.

STATE OF CONNECTICUT, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE

SUPREME COURT OF THE

STATE OF CONNECTICUT

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March 24, 1978

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The petitioner Pasquale Temporale respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Connecticut in this case.

OPINION BELOW

On March 7, 1978, the Supreme Court of Connecticut denied Pasquale Temporale's petition

for certification for appeal from the Appellate Session of the Connecticut Superior Court. This ruling is reported at 174 Conn. 802, 39 Conn. L. J. No. 38 (March 21, 1978), p. 20 (App. p. 1). The ruling of the Appellate Session of the Connecticut Superior Court, affirming Petitioner's conviction, was announced January 6, 1978, and has not yet been reported. (App. p. 2)

JURISDICTION

The judgment of the Supreme Court of Connecticut was reached on March 7, 1978 and announced on March 21, 1978.

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

1. Whether the Connecticut breach of peace statute, Conn. Gen. Stat. §53a-181, is unconstitutionally vague and overbroad.

2. Whether Petitioner's breach of peace conviction for saying to a police detective in a public place "no fucking narks are coming in here" violated Petitioner's rights under the First and Fourteenth Amendments to the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment I:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

United States Constitution, Amendment XIV, Section 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Connecticut General Statutes, Section 53a-181:

A person is guilty of breach of the peace when, with intent to cause inconvenience, annoyance or alarm, or recklessly creating a risk thereof, he: (1) Engages in fighting or in violent, tumultous or threatening behavior in a public place; or (2) assaults or strikes another; or (3) threatens to commit any crime against another person or his property; or (4) publicly exhibits, distributes, posts up or advertises any offensive, indecent or abusive matter concerning any person; or (5) in a public place, uses abusive or obscene language or makes an obscene gesture; or (6) creates a public, hazardous or physically offensive condition by any act which he is not licensed or privileged to do.

STATEMENT OF THE CASE

Following a jury trial in the Connecticut Court of Common Pleas for the Fourth Geographical Area at Waterbury, the Petitioner was convicted of interference with a police officer (C.G.S. §53a-167a) and breach of peace (C.G.S. § 53a-181). In a decision announced January 6, 1978, the Appellate Session of the Superior Court reversed the interference conviction but affirmed the conviction of breach of peace in the face of First and Fourteenth Amendment challenges.

So far as the breach of peace conviction is concerned, the Appellate Session found that the jury could have found from the evidence presented that on February 21, 1976, at about 8:30 p.m. a rock concert was in progress at the Palace Theater, located on East Main Street, Waterbury, Connecticut. This theater was owned by the Petitioner's father, who was on vacation in Florida and had placed the defendant in charge of ticket sales in his absence. The rock concert was sold

out and the theater accommodated approximately 3,000 persons. There were several hundred persons milling around in the lobby when two plainclothed Waterbury detectives entered the lobby of the theater. One of the detectives, Robert Little, had been contacted by an officer on duty inside the theater and this officer gave the detective a bag of suspected marijuana. Little and his fellow detective were on duty outside the theater while six to eight uniformed officers were on duty inside the theater upon order of the police superintendent. Upon receipt of the suspected marijuana, both detectives decided to enter the theater to investigate. They approached the Petitioner, identified themselves as police officers, showed their badges and informed him that they were there on official business. The defendant responded, "no fucking narcs are coming in this place." (Opinion, pp. 1-2) This view of the evidence accords with that of the trial court, which in denying the Petitioner's motion to set

aside the verdict ruled that the breach of peace conviction was based upon "the evidence of language addressed to Detective Little that 'no ---- narks are coming in here'...." (Record, p. 22)

Petitioner was convicted of violating the entire breach of peace statute. The Information did not limit the charge to any particular portion of the statute, and the court instructed the jury under the entire statute.

REASONS FOR GRANTING WRIT

1. The Connecticut Breach Of Peace Statute Is Unconstitutionally Vague And Overbroad.

In its memorandum of decision on appeal from the trial court, the court below acknowledged that "penal statutes must be sufficiently certain so as clearly to define the conduct to which its prohibitions are addressed," and noted further that vagueness and overbreadth are two distinct claims. The state court erred, however, in finding the Connecticut breach of peace statute to be neither vague nor overbroad.

It is impossible to save from unconstitutional vagueness such language in 53a-181 as "tumultuous or threatening behavior," "offensive, indecent or abusive matter," "abusive or obscene language," "obscene gesture," and "public, hazardous or physically offensive condition...." E.g., Lewis v. City of New Orleans, 415 U.S. 130 (1974); Gooding v. Wilson, 405 U.S. 518 (1972); Wright v.

Georgia, 373 U.S. 284 (1963); Walker v. Dillard, 523 F.2d 3 (4th Cir.), cert. denied, 423 U.S. 906 (1975); Wiegand v. Seaver, 504 F.2d 303 (5th Cir. 1974), cert. denied, 421 U.S. 924 (1975); Carmichael v. Allen, 267 F.Supp. 985 (D.Ga. 1967); International Society for Krishna Consciousness, Inc. v. Rochford, 425 F.Supp. 734 (N.D.Ill. 1977); Fuller v. Scott, 328 F.Supp. 842 (M.D.N.C. 1971); Phillips v. Borough of Folcroft, 305 F.Supp. 766 (E.D.Pa. 1969); Spears v. State, 337 So.2d 977 (Fla. 1976); Conchito v. City of Tulsa, 521 P.2d 1384 (Okla.Crim.App. 1974); State v. Berker, 328 A.2d 729 (R.I. 1974).

The Connecticut court held the breach of peace statute distinguishable from those struck down in the cases noted above, and many others, because of its preliminary clause reading: "with intent to cause inconvenience, annoyance or alarm, or recklessly creating a risk thereof." Initially, one is constrained to note the unconstitutional vagueness of this clause itself. It is manifestly

impossible for any citizen of reasonable intelligence to know what the legislature meant by "inconvenience, annoyance or alarm". Moreover, several courts in other states have held that such language does not save an unconstitutionally vague penal statute. E.g., Marks v. City of Anchorage, 500 P.2d 644 (Alaska 1972); People v. Hayden, 548 P.2d 1278 (Colo. 1976); Bolles v. People, 541 P.2d 80 (Colo. 1975); Commonwealth v. Howell, 18 Cr.L. 2563 (Pa.Com.Pl. 1976); State v. Bradshaw, 541 P.2d 800 (Utah 1975).

Moreover, other than noting the existence of the constitutional principle, the Connecticut court did not address the Petitioner's contention that the breach of peace statute is unconstitutionally overbroad. Indeed, the very language in the statute which the Appellate Session thought saved it from unconstitutional vagueness is so overbroad as to infringe protected First Amendment freedoms: it is precisely the sort of speech intended "to cause inconvenience, annoyance or

alarm" which our constitutional system has the greatest stake in protecting. As this Court said in Terminiello v. Chicago, 337 U.S. 1 (1949), "a function of free speech under our system of government is to invite dispute....Speech is often provocative and challenging....That is why freedom of speech, though not absolute,...is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest." Id. at 4.

2. Petitioner's Breach of Peace Conviction For Saying To A Police Detective In a Public Place "No Fucking Narks Are Coming In Here" Violated Petitioner's Rights Under the First And Fourteenth Amendments To The United States Constitution.

The best demonstration that the Connecticut breach of peace statute is unconstitutionally overbroad is that both the trial judge and the

state appellate court were able to find that it outlawed the conduct of which the Petitioner was convicted -- loudly saying to a police officer in a crowded place that "no fucking narks are coming in here."

Many cases have held that conduct far more outrageous or provocative than that involved here, under conditions at least as incendiary, is protected by the First Amendment. Thus, in Lewis v. City of New Orleans, supra, the defendant had been convicted for "yelling and screaming" at a police officer on a public street a stream of abuse which included the language, "you god damn m.f. police." The defendant in Gooding v. Wilson, supra, had said the following things, among others, to police officers: "White son of a bitch, I'll kill you." "You son of a bitch, I'll choke you to death." "You son of a bitch, if you ever put your hands on me again, I'll cut you all to pieces."

In Commonwealth v. A. Juvenile, 334 N.E.2d 617 (Mass. 1975), the defendant for a period of

forty minutes yelled at a saleswoman in a crowded downtown department store such phrases as "f----- a-----" and "f----- pig" and accompanied the words by the gesture of giving the woman the finger.

In Hess v. Indiana, 414 U.S. 105 (1973), this court held it a violation of the First Amendment to convict the defendant of disorderly conduct for saying in a loud voice in a crowded public place: "We'll take the fucking street later."

In Brandenburg v. Ohio, 395 U.S. 444 (1969), this court reversed on First Amendment grounds the conviction of a man for making at a large rally where some people were carrying firearms remarks such as: "Bury the niggers," "the niggers should be returned to Africa," and "send the Jews back to Israel." See Watts v. United States, 394 U.S. 705 (1969) ("If they ever make me carry a rifle the first man I want to get in my sights is L.B.J.")

In Stewart v. United States, 428 F.Supp. 321 (D.D.C. 1976) (Gesell, J.), Mr. Stewart had been arrested on a charge of disorderly conduct for

shouting at a police officer on a crowded street: "Lock me up, mother fucker, lock me up you jive-ass cop." The court held that not only was Stewart's conduct protected by the First Amendment, but that the arresting officer had violated Stewart's First Amendment rights by arresting him for such action and it awarded Stewart one thousand dollars in compensatory damages under the Federal Tort Claims Act for false arrest. See Malone v. Fields, 335 So.2d 538 (La. 1976).

> In our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear....But our constitution says we must take this risk...; and our history says that it is this sort of hazardous freedom -- this kind of openness -- that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious society.

Tinker v. Des Moines Community School District, 393 U.S. 503 (1969).

CONCLUSION

For these reasons, a writ of certiorari should issue in this case.

Respectfully submitted:

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